Glow International Malaysia Sdn Bhd v Government of Malaysia & Ors

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO WA-24NCVC-3927–09 OF 2023
AHMAD SHAHRIR J
6 SEPTEMBER 2024

Civil Procedure — Government proceedings — Suit against government — Originating summons against ministry — Whether civil action may be brought against ministry — Government Proceedings Act 1956 ss 16 & 21(1)

Civil Procedure — Striking out — Originating Summons — Plaintiff filed originating summons for declaration that impugned decision of State Deputy Director of Health in ordering plaintiff to cease its business operation was void and illegal — Plaintiff had filed judicial review application against impugned decision prior to filing originating summons — Whether originating summons was abuse of court's process — Whether originating summons amounted to duplicity of proceedings — Private Healthcare Facilities and Services Act 1998 — Rules of Court 2012 O 18 r 19(1)(d) & O 53

The plaintiff, a company, was involved in the business of providing beauty treatment services. Pursuant to the regulatory visits carried out by the Director of Private Medical Practice Control Section ('the sixth defendant') at the plaintiff's business premises, the State Deputy Director of Health ('the fifth defendant') had, via a letter dated 13 January 2023, ordered the plaintiff to immediately cease its business operations in relation to the provision of facial treatment services using aesthetic laser procedures ('the impugned decision'). According to the fifth defendant, the impugned decision was aligned with certain aesthetic medical practice guidelines. Aggrieved by the impugned decision, the plaintiff had filed a judicial review application against the same. Pending the judicial review application, the plaintiff filed originating summons to seek the following reliefs: (a) a declaration that the plaintiff's business did not come within the purview of the Ministry of Health ('the second defendant') but it was within the purview of the Ministry of Domestic Trade and Cost of Living ('the seventh defendant'); (b) a declaration that the impugned decision which was communicated to the plaintiff through the letter dated 13 January 2023 was void and illegal; (c) a declaration that the plaintiff and its business had been operating legally since its inception in 2014 within the purview of the seventh defendant until the decision of the fifth defendant; and (d) a declaration that the plaintiff be allowed to continue with its business operations. In opposing the originating summons, the defendants filed the

present application to strike out the originating summons ('encl 8') based on the ground of abuse of the court's process pursuant to O 18 r 19(1)(d) of the Rules of Court 2012 ('the ROC'). The defendants argued that in seeking for a declaration that the impugned decision was void and illegal the plaintiff was effectively seeking to challenge the exercise of executive powers. Such a challenge may only be done under the purview of O 53 of the ROC by means of judicial review proceedings and not by the present originating summons. The defendants further argued that the present originating summons amounted to a duplicity of proceedings with that of the pending judicial review and that the second defendant and the seventh defendant were not legal entity. The issues that arose were: (i) whether the originating summons was an abuse of the process of the court; and (ii) whether a civil action may be brought against a ministry.

Held, allowing encl 8 and striking out the plaintiff's originating summons with costs of RM5,000:

(1) The court found that the pivotal issue and the crux of the plaintiff's complaint was the impugned decision. It was the impugned decision which had set the plaintiff's legal challenge afoot, be it for the judicial review proceedings or the present application. Being a decision which was made by the fifth defendant in the performance of a public duty pursuant to the Private Healthcare Facilities and Services Act 1998, it was thus incumbent on the plaintiff to resort to the specific procedures for prerogative writs in the form of an order of certiorari to quash the impugned decision under O 53 of the ROC but not by means of the present application. That would be an abuse of the process of the court. Additionally, the plaintiff in maintaining the present application while the judicial review proceedings was still pending was clearly maintaining actions in duplicity of one another (see paras 16 & 23–24).

(2) Section 16 of the Government Proceedings Act 1956 made it mandatory for civil proceedings by or against the Government to be instituted or proceeded with in accordance with the Act and not otherwise. Section 21(1) of the same Act provided that civil proceedings by or against the Federal Government shall be instituted by or against the Government of Malaysia. The plaintiff's counsel seemed to suggest that it was perfectly acceptable to sue the ministries because this had been similarly done in a number of other cases. However, this conception was highly erroneous. Firstly, just because it was done in other previous cases did not clothe it with any legal justification. Secondly, being the ministries of the Federal Government, they were not legal entities known in law. The relevant minister charged with the responsibility for the particular ministry and the officers of the ministry concerned may be sued but not the ministry itself. Unlike the ministers charged with the responsibility for the relevant

ministries themselves, the ministry had no legal entity of its own. The position of the law in this regard was long established (see paras 25–27).

[Bahasa Malaysia summary

Plaintif, sebuah syarikat, terlibat dalam perniagaan menyediakan perkhidmatan rawatan kecantikan. Berdasarkan lawatan kawal selia yang dijalankan oleh Pengarah Bahagian Kawalan Amalan Perubatan Swasta ('defendan keenam') di premis perniagaan plaintif, Timbalan Pengarah Kesihatan Negeri ('defendan kelima') telah, melalui surat bertarikh 13 Januari 2023, memerintahkan plaintif menghentikan serta-merta operasi perniagaannya berhubung dengan penyediaan perkhidmatan rawatan muka menggunakan prosedur laser estetik ('keputusan yang disangkal tersebut'). Menurut defendan kelima, keputusan yang disangkal tersebut adalah sejajar dengan garis panduan amalan perubatan estetik. Terkilan dengan keputusan yang disangkal tersebut, plaintif telah memfailkan permohonan semakan kehakiman terhadap keputusan tersebut. Sementara menunggu permohonan semakan kehakiman tersebut, plaintif telah memfailkan saman pemula untuk mendapatkan relif-relif berikut: (a) pengisytiharan bahawa perniagaan plaintif tidak berada dalam bidang kuasa Kementerian Kesihatan ('defendan kedua') tetapi ia adalah dalam bidang kuasa Kementerian Perdagangan Dalam Negeri dan Kos Sara Hidup ('defendan ketujuh'); (b) pengisytiharan bahawa keputusan yang disangkal tersebut yang dimaklumkan kepada plaintif melalui surat bertarikh 13 Januari 2023 adalah terbatal dan tidak sah; (c) pengisytiharan bahawa plaintif dan perniagaannya telah beroperasi secara sah sejak penubuhannya pada 2014 di bawah seliaan defendan ketujuh sehinggalah keputusan defendan kelima dibuat; dan (d) pengisytiharan bahawa plaintif dibenarkan meneruskan operasi perniagaannya. Dalam menentang saman pemula tersebut, defendan-defendan memfailkan permohonan semasa untuk membatalkan saman pemula tersebut ('lampiran 8') berdasarkan alasan penyalahgunaan proses mahkamah menurut A 18 k 19(1)(d) Kaedah-Kaedah Mahkamah 2012 ('KKM 2012'). Defendan-defendan berhujah bahawa dalam mendapatkan pengisytiharan bahawa keputusan yang disangkal tersebut adalah terbatal dan tidak sah, plaintif pada hakikatnya ingin mencabar pelaksanaan kuasa eksekutif. Cabaran sedemikian hanya boleh dilakukan di bawah bidang kuasa A 53 KKM 2012 melalui prosiding semakan kehakiman dan bukan melalui saman pemula semasa. Defendan-defendan selanjutnya berhujah bahawa saman pemula semasa terjumlah kepada prosiding berganda dengan semakan kehakiman yang belum selesai dan defendan kedua dan defendan ketujuh bukan entiti yang sah. Isu-isu yang timbul ialah: (i) sama ada saman pemula tersebut adalah penyalahgunaan proses mahkamah; dan (ii) sama ada tindakan sivil boleh dikenakan terhadap sesuatu kementerian.

Diputuskan, membenarkan lampiran 8 dan membatalkan saman pemula plaintif dengan kos sebanyak RM5,000:

(1) Mahkamah mendapati bahawa isu penting dan pokok aduan plaintif adalah keputusan yang disangkal tersebut. Keputusan yang disangkal itulah yang menyebabkan cabaran undang-undang plaintif dimulakan, sama ada untuk prosiding semakan kehakiman atau permohonan semasa. Sebagai keputusan yang dibuat oleh defendan kelima dalam melaksanakan tugas awam menurut Akta Kemudahan dan Perkhidmatan Jagaan Kesihatan Swasta 1998, maka adalah menjadi tanggungjawab plaintif untuk menggunakan prosedur khusus untuk writ prerogatif dalam bentuk perintah certiorari untuk membatalkan keputusan yang disangkal tersebut di bawah A 53 KKM 2012 tetapi bukan melalui permohonan semasa. Itu akan menjadi penyalahgunaan proses mahkamah. Di samping itu, plaintif dalam mengekalkan permohonan semasa sedangkang prosiding semakan kehakiman masih belum selesai jelas telah mengekalkan tindakan berganda (lihat perenggan 16 & 23–24).

(2) Seksyen 16 Akta Prosiding Kerajaan 1956 mewajibkan prosiding sivil oleh atau terhadap Kerajaan dimulakan atau diteruskan mengikut Akta tersebut dan bukan sebaliknya. Seksyen 21(1) Akta yang sama memperuntukkan bahawa prosiding sivil oleh atau terhadap Kerajaan Persekutuan hendaklah dimulakan oleh atau terhadap Kerajaan Malaysia. Peguam plaintif seolah-olah mencadangkan bahawa tindakan menyaman kementerian adalah dibenarkan kerana ini telah dilakukan dalam beberapa kes lain. Walau bagaimanapun, konsep ini adalah sangat salah. Pertama, hanya kerana ia dilakukan dalam kes-kes terdahulu yang lain tidak memberikannya apa-apa justifikasi undang-undang. Kedua, sebagai kementerian-kementerian dalam Kerajaan Persekutuan, mereka bukan entiti undang-undang yang diperakui di bawah undang-undang. Menteri yang berkenaan yang dipertanggungjawabkan dengan tanggungjawab untuk kementerian tertentu dan pegawai kementerian berkenaan boleh disaman tetapi bukan kementerian itu sendiri. Berbeza dengan menteri-menteri yang dipertanggungjawabkan dengan tanggungjawab untuk kementerian itu sendiri, kementerian tidak mempunyai entiti undang-undang sendiri. Kedudukan undang-undang dalam hal ini telah lama ditetapkan (lihat perenggan 25–27).]

Cases referred to

Abdul Latif bin Puteh & Ors v Pentadbir Tanah Jajahan Pasir Mas & Anor [2023] 1 MLJ 330; [2023] 1 CLJ 161; [2023] 1 MLRA 829, FC (refd)

Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd [1993] 3 MLJ 36; [1993] 4 CLJ 7; [1993] 1 MLRA 611; [1993] 2 AMR 1969, SC (refd)

Lai Yoke Ngan & Anor v Chin Teck Kwee & Anor [1997] 2 MLJ 565; [1997] 3 CLJ 305, FC (refd)

Sivarasa Rasiah & Ors v Che Hamzah Che Ismail & Ors [2012] 1 MLJ

473; [2012] 1 CLJ 75, CA (refd)
Tan Wei Hong (a minor suing through guardian ad litem and next friend Chuang Yin E) & Ors v Malaysia Airlines Bhd and other appeals [2019] 1 MLJ 59; [2018] 9 CLJ 425; [2018] 6 MLRA 433; [2018] 6 AMR 529, FC (refd)
Vestime Corp Sdn Bhd v YBLE Resources Sdn Bhd & Ors [2006] 3 MLJ 554; [2006] 2 CLJ 196; [2006] 1 MLRH 166; [2006] 3 AMR 151, HC (refd)

Legislation referred to

Government Proceedings Act 1956 ss 16, 21(1)
Private Healthcare Facilities and Services Act 1998
Rules of Court 2012 O 18 r 19(1), O 33 r 3, O 53

Chris Lim Su Heng (with Sivanesan K Selvaratnam and Nur Khidmah bt Huzaisham) (Chris Lim Su Heng) for the plaintiff.
Nur Idayu bt Amir (Senior Federal Counsel, Attorney General's Chambers) for the defendants.

Ahmad Shahrir J:

INTRODUCTION

[1] The fifth defendant rendered a decision against the plaintiff vide a letter dated 13 January 2023. The letter was addressed to one of the plaintiff's directors, namely Mr Lucas Sandral. The decision was in relation to an order for the plaintiff to immediately cease its business operations in relation to the provision of facial treatment services using aesthetic laser procedures ('impugned decision'). According to the fifth defendant, the impugned decision was aligned with certain aesthetic medical practice guidelines. The impugned decision was made pursuant to the regulatory visits carried out by the sixth defendant at the plaintiff's business premises.

[2] The impugned decision had affected and effectively prevented the plaintiff from continuing with its business operations. Feeling aggrieved, the plaintiff then filed the present originating summons for certain declaratory orders against the defendants. Chiefly, the plaintiff was seeking to have the impugned decision declared void and illegal.

[3] The defendants applied under O 18 r 19(1) of the Rules of Court 2012 to strike out the originating summons. The defendants' application was premised on para (d) on the ground that the originating summons was an abuse of the process of the court.

[4] On a perusal of the originating summons and the affidavits filed for and

against the application and considering the positions of the respective parties as deliberated in the submissions, this court made a finding that the plaintiff's application was obviously unsustainable. Thus, the defendants' application in encl [8] was allowed and the plaintiff's originating summons was accordingly struck out with RM5,000 cost. The plaintiff was not satisfied with the decision and appealed.

BRIEF BACKGROUND FACTS

[5] The plaintiff was established to carry on the business of providing beauty treatment services. Specifically, the plaintiff intended to provide facial treatment services by means of aesthetic laser procedures. The laser treatment was of the noninvasive type. According to the plaintiff the technology was approved by the Food and Drug Administration, USA (US FDA).

[6] For the purposes of its business operations, the plaintiff submitted an application to the seventh defendant for facilitation. In the application, the plaintiff described the nature of the services to be provided. In the middle of November 2014, the seventh defendant granted the plaintiff its approval to run the business subject to certain conditions. The approval was for the period of two years from the date of the letter. According to the letter, the plaintiff was granted approval to carry on the activity under the heading of 'import of medical diagnostic preparation medical laboratories activities of consultants other than architecture, engineering and management consultants'.

[7] With the approval, the plaintiff began its beauty treatment operations in several shopping malls in Kuala Lumpur and Selangor. The operation outlets carry the name and style of 'Glo Laser Centre' ('Glo Centre'). However, towards the end of December 2022 and early January 2023 the plaintiff's Glo Centre at the Suria KLCC, Mid Valley Megamall and Sogo were visited and inspected by officers of the sixth defendant.

[8] Following the inspection, on 31 January 2023 the plaintiff received a letter dated 13 January 2023 from the fifth defendant. The letter was copied to the sixth defendant. By the letter, the fifth defendant ordered for the plaintiff's business operations to cease with immediate effect. The letter referred to the inspection which was carried out the Glo Centres at the Suria KLCC, Mid Valley Megamall and Sogo shopping complexes. Based on the inspection it was found that the beauty treatment provided by the plaintiff may only be carried out at a registered medical facility or a medical facility which is licensed by the Ministry of Health and operated by qualified and registered medical practitioners.

[9] The letter further prompted the plaintiff to ensure that the premises

where the services were provided be properly registered as a private medical clinic with aesthetic as its area of interest if the plaintiff still wished to continue providing the same services. The plaintiff was also required to ensure that the services will be performed by medical officers who are in possession of valid Annual Practising Certificates and Letters of Credentialing and Privileging. This was in accordance with the Private Healthcare Facilities and Services Act 1998. Failure to comply with the instructions would result in enforcement actions under the same Act.

[10] The plaintiff was aggrieved by the impugned decision of the fifth defendant and filed for judicial review before the Special Powers Division of the Kuala Lumpur High Court to challenge it. At the material time when the application was heard, the judicial review application was still pending. Subsequently, the plaintiff filed the present originating summons and prayed for the following reliefs:

(a) for a declaration that the plaintiff's business did not come within the purview of the Ministry of Health but it was within the purview of the Ministry of Domestic Trade and Cost of Living;

(b) for a declaration that the impugned decision which was communicated to the plaintiff through the letter of 13 January 2023 was void and illegal;

(c) for a declaration that the plaintiff and its business have been operating legally since its inception in 2014 within the purview of the Ministry of Domestic Trade and Cost of Living until the decision of the fifth defendant; and

(d) for a declaration that the plaintiff be allowed to continue with its business operations.

[11] The defendant took the stance that the plaintiff's originating summons was an abuse of process and filed an application to strike it out. In crux, the learned senior federal counsel contended that in seeking for a declaration that the impugned decision was void and illegal the plaintiff was effectively seeking to challenge the exercise of executive powers. Such a challenge may only be done under the purview of O 53 of the Rules of Court 2012 by means of judicial review proceedings and not by the current originating summons. The learned senior federal counsel also argued that the present originating summons amounted to a duplicity of proceedings with that of the pending judicial review and that the second and seventh defendants were not legal entity.

ANALYSIS AND FINDINGS

[12] The principles in respect of an application to striking out a claim is trite. The oft-quoted 'obviously unsustainable' test in *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36; [1993] 4 CLJ 7; [1993] 1 MLRA 611; [1993] 2 AMR 1969 (SC), may be summarised as follows:

(a) that it is only in plain and obvious cases that recourse should be had to the summary process under the Rules;

(b) that this summary procedure can only be adopted when it can be clearly seen that a claim or answer on the face of it is obviously unsustainable;

(c) that it cannot be exercised by a minute examination of the documents and facts of the case in order to see whether the party has a cause of action or a defence;

(d) that if there is a point of law which requires serious discussion, an objection should be taken on the pleadings and the point set down for argument under O 33 r 3 of the Rules of Court; and

(e) that the court must be satisfied that there is no reasonable cause of action or that the claims are frivolous or vexatious or that the defence raised are not arguable.

[13] In illustration, the Federal Court in *Tan Wei Hong (a minor suing through guardian ad litem and next friend Chuang Yin E) & Ors v Malaysia Airlines Bhd and other appeals* [2019] 1 MLJ 59; [2018] 9 CLJ 425; [2018] 6 MLRA 433; [2018] 6 AMR 529 (FC), by reference to the decisions in *Lai Yoke Ngan & Anor v Chin Teck Kwee & Anor* [1997] 2 MLJ 565; [1997] 3 CLJ 305 (FC) and *Sivarasa Rasiah & Ors v Che Hamzah Che Ismail & Ors* [2012] 1 MLJ 473; [2012] 1 CLJ 75 (CA), explained the principles in the following parameters:

(a) whether there is an issue of law which requires lengthy argument and mature consideration;

(b) whether there is an issue of fact that is capable of resolution only after taking viva voce evidence during trial;

(c) the degree of unsustainability must appear on the face of the statement of claim without having to go into a lengthy and mature consideration in detail; and

(d) the court should not examine the evidence in summary proceedings in such a way as to amount to conducting a trial on the conflicting affidavit evidence.

[14] Although at the interlocutory stage the likelihood of success or failure in the plaintiff's claim should not be a basis to be considered by the court, it is imperative that the plaintiff's statement of claim must disclose a reasonable cause of action against the defendant (see: *Abdul Latif bin Puteh & Ors v Pentadbir Tanah Jajahan Pasir Mas & Anor* [2023] 1 MLJ 330; [2023] 1 CLJ 161; [2023] 1 MLRA 829 (FC)).

Whether the originating summons was an abuse of the process of the court

[15] According to the learned counsel for the plaintiff, the subject matter and issues between the present application and the judicial review proceedings were different, the parties were different and reliefs prayed for were different. Further, the subject of the judicial review proceedings was only in respect of the plaintiff's Glo Centre at the Suria KLCC, Mid Valley Megamall and Sogo shopping complexes. As such the substance, character and effect of the judicial review proceedings were fundamentally different than that of the present application.

[16] Respectfully, I am unable to agree with the contention of the learned counsel for the plaintiff. In my considered view, the pivotal issue and the crux of the plaintiff's complaint was the impugned decision. It was the impugned decision which has set the plaintiff's legal challenge afoot, be it for the judicial review proceedings before the Special Powers Division of the Kuala Lumpur High Court or the present application before this court. It was the impugned decision which led the plaintiff in the present application:

(a) to seek for a declaration that its business was not subject to the jurisdiction of the Ministry of Health;

(b) to seek for a declaration that is was a legal business concern since its establishment in 2014; and

(c) to seek for a declaration that to be allowed to continue its business operations.

[17] Perhaps it would be helpful to delve into the impugned decision. For ease of reference, the contents of the impugned decision are reproduced in verbatim (typographical errors deliberately included) in the original language as follows:

> ARAHAN PEMBERHENTIAN OPERASI PROSEDUR ESTETIK SELARAS DENGAN GUIDELINE ON AESTHETIC MEDICAL PRACTICE FOR REGISTERED MEDICAL PRACTITIONERS
>
> Perkara di atas adalah dirujuk.
>
> 2. Seperti yang tuan maklumi, pihak Cawangan Kawalan Amalan Perubatan Swasta (CKAPS), Jabatan Kesihatan Wilayah Persekutuan Kuala Lumpur dan Putrajaya

telah menjalankan lawatan pemantauan pada 28 Disember 2022 dan 3 Januari 2023 ke atas premis pihak tuan iaitu Glo Laser Centre KLCC. Mid Valley dan Sogo. Penemuan-penemuan terhadap lawatan tersebut telah dibincangkan di peringat Jabatan berkaitan prosedur-prosedur *Non-Invasive, Minimally Invasive* dan *Invasive,* beserta tafsiran kemudahan jagaan kesihatan swasta selaras dengan ketetapan Seksyen 2, Akta Kemudahan dan Perkhidmatan Jagaan Kesihatan Swasta 1998 [Akta 586].

3. Merujuk kepada perkara 3.0 dalam Guidelines on Aesthetic Medical Practice for Registered Medical Practitioners Second Edition, tafsiran prosedur *invasive*, *minimally invasive* dan *non-invasive* adalah seperti berikut:

3.1 Prosedur Non-Invasive — This is defined as external applications or treatment procedures that are carried out without creating a break in the skin or penetration of the integument. They target the epidermis only, dan

3.2 Prosedur Minimally Invasive — This is defined as treatment procedures that include minimal damage to the tissues at the point of entry of instruments. These procedures involves penetration or transgression of integument but are limited to the sub-dermis and subcutaneous fat; not extending beyond the superficial musculo-aponeurotic layer of the face and neck, or beyond the superficial fascial layer of the torso and limbs, dan

3.2 Prosedur Invasive — This is defined as treatment procedures that penetrate or break the skin through either perforation, incision or transgression of integument, subcutaneous and/or deeper tissues, often with extensive tissue involvement in both vertical and horizontal planes by various means, such as the use of knife, diathermy, ablative lasers, radiofrequency ultrasound, cannulae and needles.

4. Berdasarkan perkara-perkara tersebut, Jabatan ini mendapati terdapat rawatan yang dijalankan di premis tuan adalah bersifat *non-invasive* dan *minimally invasive* yang hanya boleh dijalankan di fasiliti kesihatan berdaftar dan/atau berlesen dengan Kementerian Kesihatan Malaysia dan dikendalikan oleh pengamal perubatan berdaftar dan berkelayakan. Rawatan-rawatan dimaksudkan adalah seperti berikut:

4.1 Intense Pulse Light

4.2 Chemical peel

4.3 Lasers for treating Skin Pigmentation

4.4 Laser for Hair Removal.

5. Sehubungan itu, kerjasama pihak tuan dipohon untuk memastikan segala rawatan seperti yang dinyatakan di Para 4 dihentikan secara serta merta. Sekiranya pihak tuan ingin terus menyediakan perkhidmatan laser dan estetik seperti dalam *Guidelines on Aesthetic Medical Practice for Registered Medical Practitioner Second Edition* yang dikeluarkan oleh Kementerian Kesihatan Malaysia, pihak tuan perlu memastikan premis tersebut didaftarkan sebagai sebuah klinik perubatan swasta dengan estetik sebagai *area of interest* di bawah Akta Kemudahan dan Jagaan Kesihatan Swasta 1998, dan dikendalikan oleh Pegawai Perubatan yang mempunyai sijil Perakuan Amalan *TahunaniAnnual Practicing Certificate (APC)*

dan Letter of Credentialing and Privileging (LCP).

Sekiranya tuan didapati gagal mematuhi arahan berhenti beroperasi, tindakan penguatkuasaan bawah Bahagian XVI Akta 586 boleh diambil tanpa sebarang peringatan lagi. Perhatian segera dan kerjasama pihak tuan adalah amat dihargai.

Sekian, terima kasih.

'BERKHIDMAT UNTUK NEGARA'

Saya yang menjalankan amanah,

Sgd.

(DR. RONIYUZAM BIN ABD MALEK)

MMC: 35284

Timbalan Pengarah Kesihatan Negeri (Perubatan)

Jabatan Kesihatan W.P Kuala Lumpur & Putrajaya

s.k. –Pengarah Amalan Peribatan

(u.p: Cawangan Kawalan Amalan Perubatan Swasta)

–Fail.

[18] Pursuant to the impugned decision, the plaintiff was instructed to immediately cease from continuing to provide the beauty treatment services at its centres at the Suria KLCC, Mid Valley Megamall and Sogo shopping complexes unless those centres were registered private medical clinics with aesthetic as the area of interest. Further, the impugned decision required the beauty treatment services offered by the plaintiff to be performed by suitably qualified medical officers. Most importantly, the impugned decision also forewarned the plaintiff of the legal consequences in respect of enforcement actions under the Private Healthcare Facilities and Services Act 1998 should the plaintiff fail to comply with the impugned decision.

[19] The impugned decision was rendered by the fifth defendant as a public authority. In rendering the impugned decision, the fifth defendant was exercising the powers under the provisions of the Private Healthcare Facilities and Services Act 1998 and the *Guidelines on Aesthetic Medical Practice for Registered Medical Practitioner* (2nd Ed) issued by the second defendant. This was evident from a reading of the letter of 13 January 2023 issued by the fifth defendant.

[20] The plaintiff in the present application was essentially seeking to challenge the impugned decision as being void and invalid. It was patently evident to me that the plaintiff was in effect seeking for a relief in the nature of a judicial review. This was evident looking at the way the plaintiff fashioned the originating summons. If this court were to allow the plaintiff's application, for all intents and purposes that would fundamentally mean declaring the

impugned decision as void and illegal. That would, unmistakably, be the net result if this court were to accede to the position advanced by the plaintiff.

[21] If the plaintiff were successful in its challenge, then the plaintiff would not be subject to the order to immediately cease its business operations. In that situation, the plaintiff would be able to rely on the approval granted earlier by the seventh defendant to continue providing the beauty treatment services. It must then, as a matter of course, follow that there would not be any further necessity for the plaintiff to get from this court a declaration for it to be allowed to continue its business operations.

[22] It was also clear to my mind that the relief for a declaration that the plaintiff's business was not subject to the jurisdiction of the Ministry of Health was inextricably connected with the impugned decision. In the context of the present application and the circumstances of the case, it was not the kind of declaration which could be applied for nor granted independently of the impugned decision. It could not stand on its own. There would not be any basis for such a declaration to be applied for if not for the impugned decision.

[23] On the premise of these analyses, it was perfectly clear that the substance of the plaintiff's originating summons was indeed a challenge against the impugned decision. Being a decision which was made by the fifth defendant in the performance of a public duty pursuant to the Private Healthcare Facilities and Services Act 1998, it was thus incumbent on the plaintiff to resort to the specific procedures for prerogative writs in the form of an order of *certiorari* to quash the impugned decision under O 53 of the Rules of Court 2012 but not by means of the present application. That would be an abuse of the process of the court.

[24] Additionally, the plaintiff in maintaining the present application while the judicial review proceedings before the special power division of the Kuala Lumpur High Court was still pending was clearly maintaining actions in duplicity of one another.

Whether a civil action may be brought against a ministry

[25] Section 16 of the Government Proceedings Act 1956 makes it mandatory for civil proceedings by or against the Government to be instituted or proceeded with in accordance with the Act and not otherwise. Section 21(1) of the same Act provides that civil proceedings by or against the Federal Government shall be instituted by or against the Government of Malaysia.

Sections 16 and 21(1) of the Government Proceedings Act 1956 provide as follows, respectively:

16 Civil proceedings in the High Court

Subject to this Act, civil proceedings by or against the Government as are provided by any statutory provision repealed by this Act are hereby abolished, and all civil proceedings by or against the Government in the High Court shall, subject to any other written law for the time being in force, be instituted and proceeded with in accordance with this Act and not otherwise.

21 Parties to proceedings by and against the Federal Government

(1) Civil proceedings by or against the Federal Government shall be instituted by or against, as the case may be, the Government of Malaysia.

[26] The plaintiff included the second and seventh defendants as parties in the originating summons. The second and seventh defendants are the Ministry of Health and the Ministry of Domestic Trade and Cost of Living, respectively. The learned counsel for the plaintiff seemed to suggest that it was perfectly acceptable to sue the ministries because this has been similarly done in a number of other cases.

[27] With respect, this conception was highly erroneous. Firstly, just because it was done in other cases before that did not clothe it with any legal justification. Secondly, being ministries of the Federal Government, they were not legal entities known in law. The relevant minister charged with the responsibility for the particular ministry and the officers of the ministry concerned may be sued but not the ministry itself. Unlike the ministers charged with the responsibility for the relevant ministries themselves, the ministry has no legal entity of its own (see: *Vestime Corp Sdn Bhd v YBLE Resources Sdn Bhd & Ors* [2006] 3 MLJ 554; [2006] 2 CLJ 196; [2006] 1 MLRH 166; [2006] 3 AMR 151). The position of the law in this regard was long established.

CONCLUSION

[28] Thus, based on the reasons as aforesaid, this court found that the plaintiff's application was obviously unsustainable. As such, encl [8] was allowed with RM5,000 cost.

Enclosure 8 allowed; plaintiff's originating summons struck out with costs of RM5,000.

Reported by Dzulqarnain Ab Fatar